BRB No. 97-1065 BLA

OSSIE E. GAMBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Ossie E. Gamble, Beauty, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (95-BLA-224) of Administrative Law Judge Robert L. Hillyard denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the second time and involves a duplicate claim.[1] On remand, the administrative

[1] In its previous decision in this case, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1), (4) and remanded the case for further consideration. The Board affirmed the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3)

law judge found that the newly submitted evidence did not indicate that claimant suffered from pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) or was totally disabled pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied as claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. In the instant appeal, claimant generally contends that the administrative law judge's findings are erroneous. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has indicated that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. On remand, the administrative law judge found that claimant's new evidence contains seven interpretations of two x-rays, and that four of these interpretations are

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and instructed the administrative law judge to consider whether claimant established total disability pursuant to 20 C.F.R. §718.204(c) if he determined on remand that claimant did not establish pneumoconiosis pursuant to Section 718.202(a)(1) or (4). The Board therefore vacated the administrative law judge's finding that claimant did not establish a material change in conditions, and remanded the case to the administrative law judge. *Gamble v. Wolf Creek Collieries*, BRB No. 96-0780 BLA (Oct. 25, 1996)(unpub.).

negative for pneumoconiosis. Decision and Order on Remand at 2. The administrative law judge further found that of those four negative interpretations, three were by physicians who were dually qualified as board-certified radiologists and B-readers, while of the three positive interpretations, only one was by a dually qualified physician, Dr. Fisher, and the other two were by B-readers. The administrative law judge relied on the numerical superiority of the negative interpretations by the dually qualified physicians and permissibly concluded that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(1). *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). The administrative law judge next found that because he again found the x-ray evidence to be negative for pneumoconiosis, he adopted and incorporated his findings pursuant to Section 718.202(a)(4) that claimant had not established the existence of pneumoconiosis by the medical opinion evidence. The administrative law judge acted within his discretion in finding that Dr. Baker's opinion, that claimant suffered from pneumoconiosis, was insufficient to establish claimant's burden of proof because the physician's positive x-ray interpretation was reread by better qualified physicians as negative and because Dr. Baker's reliance on claimant's length of exposure to coal dust did not constitute a rational basis for diagnosing pneumoconiosis. *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); *Arnoni v. Director, OWCP*, 6 BLR 1-427 (1983); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge also permissibly accorded greater weight to Dr. Fritzhand's opinion, that claimant suffered from hypertension and chronic obstructive pulmonary disease due to smoking, as it was supported by an examination of claimant, the objective tests, symptoms and histories given by claimant and the x-ray interpretations of the more highly qualified physicians. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Perry, supra*. We therefore affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a).

The administrative law judge also considered the newly submitted evidence to determine whether claimant established total disability pursuant to Section 718.204(c). The administrative law judge properly concluded that claimant did not establish total disability pursuant to Section 718.204(c)(1)-(3) because none of the pulmonary function or blood gas studies were qualifying and the record did not contain evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 11, 29. At Section 718.204(c)(4), the administrative law judge properly found that Dr. Baker's statement that claimant should have no further exposure to coal dust and could not perform sustained manual labor on an eight hour basis did not constitute an opinion of disability under the Act. Decision and Order on Remand at 3; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Company, Inc.*, 12 BLR 1-83 (1988). The

administrative law judge also found that Dr. Fritzhand's opinion, that the miner is unable to perform his last coal mine employment of greater than one year duration based on the number of years of exposure to coal dust and pulmonary function study, is not a reasoned opinion because length of exposure is not a valid basis for determining disability and the pulmonary function study was determined to be invalid by the physician. Decision and Order on Remand at 3; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Piccin, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley of Utah, Inc.*, 12 BLR 1-111 (1989). As the administrative law judge permissibly weighed the evidence, we affirm his conclusion that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 as it is supported by substantial evidence and in accordance with law. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge